Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ERVIN BARCLAY,

Petitioner,

vs.

ALABAMA GAS CO. and GAS FITTERS LOCAL UNION NO. 548,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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47 pp

QUESTION PRESENTED

Is a civil litigant entitled to post-judgment relief pursuant to Federal Rule of Civil Procedure 60(b)(6) when post-judgment evidence indicates that the litigant was denied its due process right to a fair trial because summary judgment was granted to both defendant Gas Fitters Union Local 548 (hereafter "Local Union 548"), even though the defendant breached its duty of fair representation and defendant Alabama Gas Corporation (hereafter "The Company") which wrongfully terminated the civil litigant in violation of the collective bargaining agreement between the company and the union.

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Petitioner, Ervin Barclay, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Ervin Barclay v. Alabama Gas Corporation, Gas Fitters Local, Union #548* is reported at (App. A). The opinion of the district court in *Ervin Barclay v. Alabama Gas Corporation, Gas Fitters Local, Union #548* is reported at (App. B). The order of the district court dated October 5, 1995 in *Ervin Barclay v. Alabama Gas Corporation, Gas Fitters Local, Union #548* is reported at (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States District Court for the Northern District of Alabama was entered on October 27, 1995 (App. B). The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on February 27, 1997 (App. A). The Court of Appeals denied a timely petition for rehearing on July 18, 1997 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Federal Rule of Civil Procedure 60(b)(6) provides:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

Ervin Barclay, an Alabama Citizen, brought a *pro se* action under 29 U.S.C. § 185 against his former employer, Alabama Gas Corporation and the Gas Fitters Local Union 548, the labor organization in which he was previously a member. Mr. Barclay alleged that Alabama Gas Corporation violated a Collective Bargaining Agreement by wrongfully discharging him and that Union 548 breached it's duty to represent him fairly in arbitrating his complaint. The District Court granted Summary Judgment in favor of Alabama Gas and Union 548. Mr. Barclay appealed the judgment of the District Court to the Eleventh Circuit Court of Civil Appeals on February 27, 1997, the judgment of the District Court was affirmed.

Mr. Barclay employed the undersigned and a Notice of Appearance and request for Extension of Time was filed on March 20, 1997. A motion to file Out of Time was filed on March 27, 1997.

The fundamental question in this case is whether the Union had a responsibility and duty to fairly represent all the members within the bargaining unit as individuals as well as collectively. To appreciate the significance of the issues presented by this case, it is essential to consider the following:

A. Background of the 1997 Judgment.

On February 16, 1994 Defendant/Respondent Alabama Gas Corporation ("the company") fired Plaintiff/Petitioner Ervin Barclay (Mr. Barclay), a nine year veteran construction mechanic, for supposed "gross misconduct" when one of his crew members (Jackson) pulled a knife on him at a job site. A second crew member (Gilley) said Mr. Barclay had a gun. Mr. Barclay denied having a gun, but admitted having pulled his company issued service knife out of his pocket without opening the blade and holding it down to his side, which may have caused Gilley to believe Mr. Barclay had a gun. Gilley grabbed Jackson, the man wielding the knife, by the arm, and said he's got a gun. Jackson repeated he's got a gun, then he said "so you are going to shoot me, huh!" Then Jackson put up his knife and as he moved to the company truck he said "you've had it now!" Then Jackson left the job site in the company pick-up, returned to the service center and reported to Gordon Jones. Mr. Barclay's two company issued vehicles were searched, as well as the job site, and no gun was found. Mr. Barclay was charged with Reckless Endangerment by Howard Jackson, the fellow crew member with the knife, and after trial in the municipal court of Talladega, Alabama, Mr. Barclay was found not guilty.

On February 9, 1994 the company had over 275 miles of pipe line in the Anniston District. Anniston District covered a number of counties including both the city of Anniston and Talladega, Alabama. From 1985 until February 1994 no other black male had achieved the position of construction mechanic in the Anniston District. Once Mr. Barclay completed welding school, as a certified welder, he was eligible to move up from being classified as a "crewman 1st class" to a "construction mechanic." Mr. Barclay knew that the construction mechanic, supervisor of his crew was scheduled to retire, so he prepared to replace him. By 1992, Mr. Barclay had begun his two (2) year

apprenticeship as a construction mechanic. Construction mechanics supervise a two-person crew, both of which are members of the Steeleworkers Union. The "crew member position" is held by the least senior person in the crew. The next "crew member position" would be crewman 1st class and the "supervisor position" was the construction mechanic. Membership in Union 548 was limited to skilled workers and as a welder, Mr. Barclay qualified and left the other union (Steelworkers Union 15456), which represented most of the employees of the company, and joined Union 548. Mr. Barclay was the first black male to join this union in the Anniston District. Mr. Barclay was not warmly received by the membership of Union 548. Mr. Barclay was a quiet man, and had been a hard worker for over nine (9) years.

Gordon Jones was the construction mechanic supervisor over the Anniston District. Gary Welch was the manager of the Talladega office of the company. The company headquarters are located in Birmingham, Alabama. Race relations within the Talladega office were tense. A complaint had been filed at the Birmingham Headquarters by a black female over her mistreatment in the Talladega office.

After both men were fired, Mr. Jackson had a grievance filed on his behalf by a union representative of the Steeleworkers Union 15456, and Mr. Barclay, a member of Union 548, had a grievance filed on his behalf, which went to arbitration. One arbitrator was appointed for Mr. Barclay's grievance, instead of three as per the 1992 Collective Bargaining Agreement ("CBA"). The arbitrator affirmed that the discharge was for a just cause.

B. The Proceedings Below.

In an effort to address what he considered a violation of his

"Constitutional Rights", Mr. Barclay, filed suit *Pro se* in the United States Federal District Court, alleging that the Union had breached it's duty of fair representation by acting arbitrarily and discriminatorily in it's treatment of him following the arbitration. Mr. Barclay claimed that the actions of defendant Labor Union violated the "Constitutionality and Construction" of § 301(A) of the Labor Management Relations Act (29 U.S.C. § 185(A)) conferring jurisdiction on Federal District Courts in actions for violation of contracts between the employer and the labor organization. In addition he filed suit against the Gas Company for wrongful termination in violation of the Collective Bargaining Agreement between Defendant Local Union #548 and the Company. While Plaintiff was still *Pro se*, and as soon as the lawsuits were served and answers were filed by the defendants, a Motion for Summary Judgment quickly followed on behalf of both defendants. The District Court recognized that there existed a "material question of fact" the Collective Bargaining Agreement called for three arbitrators to hear the arbitration and the evidence reflected that only one arbitrator heard the case. This should have called for the court's October 5, 1995 order to have read *summary judgment denied.* The dynamic set up by the language of the court's pre-decision order dated October 5, 1995, wherein the court stated,

> Without precommitting to anything, if the two defendants in this case want this court to give serious consideration to their motion for summary judgment, they will by 4:30, October 13, 1995, submit affidavits or other relevant evidentiary material to meet the court's concerns as above expressed.

If the requirements had not been met by the defendant(s), movant(s) at this point for the judge to be able to grant summary judgment, then the motion should have been denied. (*See* App. C).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT, EVEN THOUGH HE IS PRO SE, TO HAVE HIS CASE FULLY ADJUDICATED IN A COURT OF LAW INSTEAD OF SUMMARY JUDGMENT BEING GRANTED, WHEN THE COURT ACTUALLY FINDS THAT THERE EXISTS MATERIAL QUESTIONS OF LAW.

Mr. Ervin Barclay's Petition for Writ of Certiorari should be granted because the opinion below conflicts with this Court's prior rulings on a litigant's fundamental due process right to a fair trial, even though *Pro se*.

The District Court stated in it's written opinion dated October 27, 1995 as follows concerning Rule 56(c) of the Federal Rules of Civil Procedure wherein it states, in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Pursuant to this requirement

> the moving party (must) . . . show the District Court, by reference to materials on file, that

> there are no genuine issues of material fact that should be decided at trial.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); *Clemons v. Dougherty County*, 684 F.2d 1365 (11th Cir. 1982). The exact weight of this burden depends on whether the movant bears the burden of proof at trial. In *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc), the Eleventh Circuit distinguished these two discrete situations:

> When the nonmoving party has the burden of proof at trial, the moving party is not required to "support its motion with affidavits or other similar material negating the opponent's claim," Celotex, 477 U.S. at 323, 106 S.Ct. at 2553, in order to discharge this "initial responsibility." Instead, the moving party simply may " 'show( )' — that is, point ( ) out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 324, 106 S.Ct at 2554. Alternatively, the moving party will be unable to prove its case at trial. *Id.* at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting).
>
> * * *
>
> When the moving party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it "must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at

> trial." *Id.* at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting); *see also Chanel, Inc.*, 931 F.2d at 1477. In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party. *See Id.* at 1477.

(Footnote omitted). In the instant case, the motion was filed by the party not bearing the burden of proof at trial.

The District Court additionally stated: "[w]e view all evidence and reasonable factual inferences drawn therefrom in the light most favorable to the party opposed to the motion."; *Warren v. Crawford*, 927 F.2d 559, 561-562 (11th Cir. 1991); *Warrior Tombigbee Transp. Co., Inc. v. M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983).

> . . . Once the movant meets his burden . . . the burden shift(s) to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment."

929 F.2d at 608; *Chanel, Inc. v. Italian Activewear, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). (*See* Appendix B).

As stated by the Eleventh Circuit Court in the case of *Turnes v. Amsouth Bank, N.A.*, 36 F.3d 1057, 1061 (11th Cir. 1994): "summary judgment is appropriate where there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law."

Both defendants then filed affidavits that stated, "in essence we have violated the conditions of the CBA". Upon receipt of

these two affidavits the court granted summary judgment. (*See* App. B).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE IMPORTANCE OF DUE PROCESS AND FAIR REPRESENTATION IN THE ARBITRATION PROCESS.

The Labor Management Relations Act, 1947, § 301, 29 U.S.C. § 185, states the following:

> Labor Unions, as exclusive bargaining agents in negotiation and administration of collective bargaining contracts have a responsibility and a duty to fairly represent employees within the bargaining unit as individuals and well as collectively.

In *Smith v. Hussman Refrigerator Co.*, 619 F.2d 1229 (1980), it states the following:

> The duty of fair representation balances the collective and the individual interests of employees in the bargaining unit as these interest are represented by a labor organization in order to promote the goals of congressional labor legislation, to minimize industrial strife and encourage full production. In particular, "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of

> redress by the provisions of federal labor law."

Vaca v. Sipes, 386 U.S. 171, 182, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).

The Defendant/Respondent Union breached it's duty to fairly represent Mr. Barclay in violation of his Right to Due Process. The Union attorney, Mr. Stockham, refused to allow any issues of race to be brought into the arbitration hearing. How could Mr. Stockham adequately represent Mr. Barclay when he had already decided to exclude the pertinent issue of race? How could he, in good conscience, do this, knowing full well that Mr. Barclay was the first black man to reach the position of construction mechanic in the Anniston district. Mr. Barclay was also the only black man to be a member of Union 548 at that time. In the Anniston District, race was an issue which was ignored in spite of the fact that Mr. Barclay's race put him into a unique position. Mr. Stockham failed to call witnesses who could show the constant insubordination and threats that Mr. Barclay had to deal with on a daily basis. He failed to call any Union officials or members who would have testified, beyond Roy Champion, on behalf of Mr. Barclay. Mr. Stockham failed to allow Mr. Barclay to defend himself, in that he asked Mr. Barclay only one question, which had nothing to do with the incident which caused the arbitration hearing in the first place. He failed to address the fact that the company's mid-level management had perpetually found ways to undermine Mr. Barclay's authority as a construction mechanic. The District Court, in it's opinion, stated "that Mr. Stockham's claim for $11,000 created an assumption that he fairly and to the best of his ability defended Mr. Barclay." Why had there not been any questions of any employees other than Mr. Gilley, Scott Cooper, and Roy Champion about the relationship between Mr. Barclay

and Mr. Jackson? The rest of the time he was there, Mr. Barclay was questioned by the attorney for the company and the arbitrator. The actions of Mr. Stockham appeared to indicate that the attorney for the company, the arbitrator and Mr. Stockham were all on the same side. Further, did the attorney for the union, Mr. Stockham, know that the black employees, Mr. Gilley and Mr. Jackson, who were working under Mr. Barclay's supervision, exhibited resentment, and created a challenge to his authority. Would the fact that the arbitrator received no testimony from Jackson, the knife wielding crew member, affect his ability to see the truth of the facts being testified to by others. Mr. Stockham and the Union Representative stormed out of the arbitration room when Mr. Barclay responded to the arbitrator's question "on the date of the incident did he own or possess a derringer?" What was the purpose of Mr. Stockham's storming out of the arbitration hearing, at that point? A reasonable lawyer would have objected before his client had an opportunity to answer this double question, instead, Mr. Stockham jumped up and left the room. In the case of *Hines v. Local Union No. 377, Chauffeurs, Team., W. & H.*, 506 F.2d 1153 (1974), we quote,

> there are allegations of bad faith and the assertion of a reason for it, and the district court's ruling that "plaintiff's have failed to reveal even a threshold issue of bad faith" should not have been made without affording them the opportunity to prove this contention.

Mr. Stockham's actions appeared to have been an act of "bad faith," when he stormed out of the arbitration hearing created a negative impression on the arbitrator. When a client has made a response that has potential negative impact, it is the duty of his lawyer to respond with "damage control" and not by exiting the room. In the case of *Papavarits v. Communication*

Workers of America Local 31207, 772 Supp. 604 (1991), the court says that the acts must be outside a wide range to be irrational. Mr. Stockham, representing the first black union member (Mr. Barclay) of Union 548, as well as, the first black construction mechanic in the Anniston district, told his client (Mr. Barclay) the day before the arbitration hearing "we are not going in there with no racial stuff." To disregard racial discrimination in certain arbitration matters may be considered bad faith conduct on the part of the union attorney. Mr. Stockham was aware of the actions of the white mid-level managers, Welch and Jones, undermining the authority of Mr. Barclay, which encouraged Jackson, the knife wielding crew member, to threaten Mr. Barclay. Why was Howard Jackson, the knife wielding attacker not called as a witness? Mr. Howard's testimony would have tied the undermining of Mr. Barclay's authority to the confrontation of February 9, 1994. *The litigant was wrongfully terminated by the actions of defendant company through acts of mid-level managers which compromised the integrity of the arbitral process.*

- When Mr. Barclay was selected to begin his apprenticeship training in Anniston, the main headquarters in Birmingham allotted Mr. Barclay a car for his use to travel from Talladega to Anniston for that training. Gordon Jones, construction supervisor, and Gary Welch, plant manager Talladega, scheduled Mr. Barclay to go on work assignments instead of allowing him to receive the training he was supposed to be receiving in Anniston. This continued until upper management in Birmingham found that the tag on the vehicle which Mr. Barclay was supposed to be using, was expired. This alerted the Birmingham office to inquire into the matter, the resolution was such that the car was returned to Birmingham and Gary Welch was instructed to send Mr. Barclay to apprenticeship training even if he had to take his crew with him.

- After graduating from the welder's school and receiving his certificate, in order to become a construction mechanic, Mr. Barclay was required to take a Journeyman Test. The company provided the text books (called a "six pack") to assist Mr. Barclay in preparing for the test. Mr. Barclay however was denied use of these books until three weeks before the test because Gordon Jones said that Gary Welch was responsible to give him the books and Gary Welch claimed Gordon Jones should have given him the books. According to the teachers of the course and other students, Mr. Barclay should have received these books six months to a year before taking the test. Mr. Barclay failed his first test because he was prevented from properly preparing for the test. On his second attempt to take the test he made a 97%.

- While Isaac Booker was still alive and Jackson had been assigned to Barclay, Isaac Booker was the shop steward for Union 15456. Mr. Barclay's crew worked two hours overtime and the rule at that time called for the company to either buy them supper and bring it to you or reimburse crew men $3.50 and $4.00 for construction mechanics. Gary Welch refused to pay the supper allowance to Mr. Barclay's crew. Isaac Booker went to the union steward for 548 and Gordon Jones. The money was paid out of Anniston's petty cash. The next day when Mr. Barclay arrived at work, Gary Welch was very angry and he let Mr. Barclay know under no uncertain terms, if he found out that Mr. Barclay had said anything to influence Gordon Jones in making Mr. Jones reprimand Welch, he would make things hard for Mr. Barclay.

- That same afternoon Gordon Jones, Gary Welch and Donald Hubbard (548 Union Shop Steward) while Mr. Barclay was in Lincoln at a job site, and in front of crew man Jackson, verbally attacked Mr. Barclay to the point of

bringing him to tears. The trio effectively conveyed to him that they would force him out of the construction mechanic position. Gordon Jones said, "If you say or mention anything about the conversation we had yesterday regarding the vouchers, your damn ass is going to be in trouble." Mr. Barclay threw up his hands and said, "I hope God kill me if this is not what I said," and he went on to tell in front of the group exactly what had been said by Mr. Welch and what he said to Gordon Jones. The Union Shop Steward for union 548, Donald Hubbard, a meter reader, did not say a word. Because of the nature of his position, he had to have been notified and arrangements made for him to come to the site with Gordon Jones and Gary Welch. Why would Jones and Welch bring a union steward to a job site to do what they did? Up to this point Mr. Barclay had not experienced any confrontations with the Union 548, however this meeting planted a seed for the union and the company to join forces in their effort to get rid of Ervin Barclay. It is interesting to note that Mr. Welch and Mr. Jones stated to Mr. Barclay that they would bust him back down to a crew man, and they both instructed Mr. Barclay not to say anything to anybody. They only left him when the confrontation started to draw attention of people in the area. Mr. Barclay was still in tears.

- After they left, Mr. Barclay went to the service center, Donald Hubbard, his Union Steward, talked to him and told him, "don't say anything to anybody else about what happened and don't worry about it." *A grievance should have been filed immediately by this 548 Union Steward, but none was filed.* Mr. Barclay went home and told what had happened to a friend who had access to the company's main office in Birmingham. He took notes on what he told him. He told Mr. Barclay that some higher up individuals in management already knew how Gordon Jones and Gary Welch were treating him, giving him a hard time about the job and that this confirmed it.

- The very next time Mr. Barclay saw Gordon Jones, at the next Safety meeting in Anniston, he was very upset and red. Mr. Barclay knew Jones had been confronted by upper management. Sam Presley, another construction mechanic, had busted a water line and messed up a parking lot in Pell City. Gordon Jones had in the past ranted and raved at such things but this time he said almost nothing about it. Gordon Jones was careful about everything that day. He treated Mr. Barclay very coldly.

- Not long after that Mr. Barclay's personnel file was removed from the Talladega office. Gary Welch had been highlighting the minor mistakes made on orders and other such paperwork that Mr. Barclay had done and put them in his file. Gary Welch told him that, "in the future, since you reported me to Birmingham, if you make a mistake, it will go directly to Birmingham," Mr. Barclay had never heard of this kind of procedure before, instead of his files being kept in the Talladega office where all the rest of employees had files, his file had been sent to the main office in Birmingham to keep Gary Welch from continually putting negative things in his file.

- Everyday Mr. Barclay was required to keep an inventory of what was on his truck. Each morning he would fill out a requisition for material used. Gary Welch said that it was taking too much time for him to do this each day. Yet four construction mechanics in Anniston did the same thing in the same time frame. Gary Welch started making Jackson believe that he could do the requisition that Barclay was doing even though Jackson was in a different job classification and a different union. Gary Welch told Mr. Barclay that he was going to have Jackson start doing the requisition for him. Mr. Barclay told Gary Welch that he did not need Jackson to do that, but Mr. Barclay just wanted

Jackson to do what he was supposed to do for his own job. Welch tried to cover himself by saying he was trying to get their crew out faster. This was against company policy and union policy. Gary Welch had talked to Jackson about it. Mr. Barclay went to his shop steward about the matter. Gary Welch was told a grievance would be filed if he kept trying to force the issue.

- Two days later Mr. Barclay got a call on his telephone and one on his beeper from Bill Nelson who is over Anniston Service Department. He told Mr. Barclay there was a leak in Pell City, could Mr. Barclay catch it? Mr. Barclay asked him who was to be working and Bill Nelson said he had already contacted one Barclay's crew to meet him at the Service Center and he would try to reach the other crew member while Mr. Barclay was on his way in to the service center. Barclay returned to the Service Center to give him a call and Nelson told him that he could not get his crew to go to Pell City, but he would have a crew from Anniston meet him out there. He further instructed him to call Gordon Jones when he got close to Pell City and he would give him directions on how to get to where they were. Gordon Jones directed Mr. Barclay to the job site on Lee Road in Pell City. When he arrived he saw Gordon Jones there, John Smith, a service man, Sam Presley, a construction mechanic and a female construction crew member. After parking, even though there was another construction mechanic on site Mr. Barclay was told to unload his tractor. He unloaded and moved to the dig site and dug down to the gas main. The woman crew member was cleaning the spot. They were going to cut off the gas at the one house that was affected. The woman and Mr. Barclay started cleaning off the main and Mr. Barclay was told what work needed to be done by the female crew man. Although Mr. Barclay was in a position of higher authority than the female, she was ordering him

around in front of the other construction mechanic, and the management employees. Mr. Barclay chose not to react to the situation, then Sam started operating Mr. Barclay's machine. A few minutes later Mr. Barclay was told to operate the machine himself. Then Gordon Jones came down there and told Mr. Barclay to idle the machine down. It starting going too low and he kept it from stalling and Gordon Jones starting cussing about how the idle on the machine was too fast. Mr. Barclay had gotten the tractor idled about where Mr. Jones wanted it. Then Mr. Jones started screaming "cut it off", it backfired and then Gordon Jones told him to load the machine and "carry your ass back to Talladega." Why he did this could only be tied to Gary Welch and the incident two days before with Jackson.

In addition to company mid-level management actions, the following events took place which led to Mr. Barclay's termination:

- Sometime in early February 1994, a week or so before February 9, Mr. Jackson stated to Mr. Barclay, "Mr. Jones told me that if he gets one more complaint on you, you gone."

This case is analogous to the *Dogherra v. Safeway Stores, Inc.*, 484 F. Supp. 396 (1980), because Mr. Barclay as did the plaintiff in that case, claims that his action under § 301 of the Labor Management Relations Act remains viable against the company whether the claim of breach of the union's duty of fair representation is proven because the company has tampered with and subverted the contractual grievance process. The mid-level management action against Mr. Barclay were so wrongful, so discriminatory, so unfair that such action undermined the integrity of the arbitration process and therefore, the adverse ruling of the arbitrator in this case needs to be disregarded and Mr. Barclay allowed to pursue his wrongful termination in the

District Court. If the action of the company mid-level management were proven then the fact that Union 548 breached it's duty of fair representation would be an additional basis for disregarding the arbitrator's decision.

CONCLUSION

This case presents a question of exceptional importance — whether a litigant is entitled to relief from a summary judgment granted by the District Court to a labor union, and a defendant/ employer, alleged to have violated the collective bargaining agreement by wrongfully terminating the plaintiff/petitioner, and where the union breached it's duty to fairly represent said litigant. By granting this request for Writ of Certiorari this Court can correct the Eleventh Circuit's decision, which sustained the District Court in defying this Court's long-standing holdings that a litigant has a due process right to fair representation without being treated arbitrarily, discriminatorily, and/or in bad faith, by ignoring meritorious grievance, or processes the grievance in a perfunctory fashion.

Accordingly, Ervin Barclay, by and through the undersigned, respectfully requests that the request for Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 27, 1997

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 95-7006
Non-Argument Calendar

District Court Docket No. CV-95-AR-1660

ERVIN BARCLAY,

Plaintiff-Appellant,

versus

ALABAMA GAS CORPORATION, GAS FITTERS LOCAL, UNION N. 548,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before ANDERSON, BLACK and BARKETT, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

Appendix A

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

IT IS FURTHER ORDERED that the plaintiff-appellant pay defendants-appellees the cost on appeal to be taxed by the Clerk of this Court.

Entered: February 27, 1997
For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 7/28/97

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, EASTERN DIVISION ENTERED OCTOBER 27, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CIVIL ACTION NO.

95-AR-1660-E

ERVIN BARCLAY,

Plaintiff,

v.

ALABAMA GAS CORPORATION, et al.,

Defendants.

MEMORANDUM OPINION

The court has before it separate motions for summary judgment filed by defendants Gas Fitters Local Union No. 548 ("the Union") and Alabama Gas Corporation ("Alagasco") in the above styled case. Plaintiff, Ervin Barclay ("Barclay"), alleges that the Union breached its duty to fairly represent him in a grievance filed against his former employer, Alagasco, which resulted in an adverse ruling and a termination of Barclay's employment with Alagasco.

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I. Pertinent Undisputed Facts

Barclay was employed by Alagasco as a Construction Mechanic, a position which placed him in charge of an Alagasco construction crew. On February 9, 1994, Barclay was involved in an altercation with Earl Jackson, a member of Barclay's construction crew, at an Alagasco work site in Talladega, Alabama. As a result of an internal investigation of the altercation, Alagasco terminated the employment of both Jackson and Barclay on or about February 16, 1994.

On February 11, 1994, Barclay filed a written grievance with the Union Plant Shop Steward, Scott Cooper, protesting his termination. The grievance proceeded through the procedural steps outlined in Article X ("grievance procedure") of the Collective Bargaining Agreement ("CBA") then in force between the Union and Alagasco. After Barclay was informed of an adverse resolution of his grievance at Step Three of the grievance procedure, he asked that his grievance be submitted to a Board of Arbitrators ("the Board") in accordance with Step Four, the final step of the procedure.

Jack Clark ("Clark") was appointed as arbitrator by the Union and Alagasco, and attorney Richard Stockham ("Stockham") was retained to represent the Union in prosecuting Barclay's grievance at arbitration Stockham spent approximately 90 hours in preparation for and prosecution of the arbitration. In that time, Stockham met with Barclay, interviewed witnesses, researched legal issues, filed a brief with the arbitrator, and argued Barclay's case at the arbitration conference which took place on November 10, 1994.[1]

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1. In his declaration filed pursuant to 28 U.S.C. § 1746, Stockham states that he billed the Union for over $11,000 for legal services rendered in this matter. *Declaration of R. Stockham* at 1.

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At the conference, Clark heard arguments, received evidence, and took briefs from both the Union and Alagasco. On March 15, 1995, Clark released his opinion and award denying Barclay's grievance.

Article X of the collective bargaining agreement, effective on July 1, 1992, states as follows, in relevant part, the grievance procedures at issue:

> *ARTICLE X — ADJUSTMENT OF GRIEVANCES*
>
> **A. STIPULATIONS:**
>
> Should any differences or disputes arise between the Company and an employee covered by this Agreement, there shall nevertheless be no strike, slowdown or suspension or cessation of work of any kind or to any extent. Neither shall there be any lockouts by the Company. Differences, questions or misunderstandings (collectively herein called "grievances") arising between the Company and any one or more of its employees covered under this Agreement shall be settled in the manner set out by this Article X.
>
> *****
>
> **A.1 STEP ONE (GRIEVANCE PRESENTED TO OPERATING SUPERVISOR):** . . .
>
> *****

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A.2 STEP TWO (GRIEVANCE PRESENTED TO LOCAL MANAGER): . . .

*****

A.3 STEP THREE (GRIEVANCE PRESENTED TO CORPORATE OFFICER): . . .

*****

A.4 STEP FOUR (GRIEVANCE PRESENTED TO BOARD OF ARBITRATORS):

In the event such grievance cannot be satisfactorily adjusted in the manner and within the time specified in Step Three above, it shall then be submitted in writing to arbitration upon written notice of desire to arbitrate given by either party to the other within ten calendar days next following the day on which the corporate officer of the Company renders a written decision as provided in Step Three next above. The matter to be submitted to arbitration shall be a copy of the written grievance filed in accordance with the provisions of Step Two of this Article X and none other. Arbitration shall be accomplished by a Board of Arbitrators, one member of which shall be appointed by the Company and one by the

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> Union and a third shall be elected by the two so appointed by the Company and the Union. . . .
>
> *****
>
> The power of the Board of Arbitrators shall be limited solely to the determination of whether or not said grievance so submitted in writing is justified, in whole or in part, such determination to be effected by applying a proper interpretation of the provisions of this agreement to the facts as found by the said Board. The Board of Arbitrators shall render its decision in writing, delivering one signed copy thereof to the Company and one signed copy to the Union, and a decision of the majority of the members of said Board shall be final and binding on all parties.

Plaintiff's exhibit 2 at 30-32.

II. Analysis

a. Rule 56

Rule 56 states, in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

> material fact and that the moving party is entitled to a judgment as a matter of law.

F.R.Civ.P. 56(c). The Supreme Court of the United States interpreted this language in a trilogy of 1986 cases. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986); *see also LaTorre v. Connecticut Mut. Life Ins. Co.*, 38 F.3d 538, 540 (11th Cir. 1994). As stated by the Eleventh Circuit: "[s]ummary judgment is appropriate where there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1061 (11th Cir. 1994) ; *see also Jaques v. Kendrick*, 43 F.3d 628, 630 (11th Cir. 1995); *Warren v. Crawford*, 927 F.2d 559, 561-62 (11th Cir. 1991).

The movant's initial burden is to "infor[m] the district court of the basis for its motion." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. Pursuant to this requirement, "the moving party [must] . . . show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clemons v. Dougherty County*, 684 F.2d 1365 (11th Cir. 1982). The exact weight of this burden depends on whether the movant bears the burden of proof at trial. In *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (*en banc*), the Eleventh Circuit distinguished these two discrete situations:

> When the *nonmoving* party has the burden of proof at trial, the moving party is not required to "support its motion with affidavits

> or other similar material *negating* the opponent's claim," *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553, in order to discharge this "initial responsibility." Instead, the moving party simply may " 'show[]' — that is, point[] out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 324, 106 S.Ct. at 2554. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial. *Id.* at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting).
>
> * * *
>
> When the *moving* party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it "must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Id.* at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting); *see also Chanel Inc.*, 931 F.2d at 1477. In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party. *See id.* at 1477.

(footnote omitted). In the instant case, the motion was filed by the party not bearing the burden of proof at trial.

Once the movant meets his burden, the non-movant must show the existence of a genuine issue as to a "material fact." *See Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1425 (11th Cir. 1992); *Celotex*, 477 U.S. at 322-23, 106 S. Ct. at 2552 (non-movant must show "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). As the Eleventh Circuit held in *Clark*, "when the burden has been met [by the movant] . . . the burden shift[s] to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." 929 F.2d at 608; *Chanel, Inc. v. Italian Activewear, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). In order to determine "which facts are material," the court "examines the substantive law involved." *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995); *see also Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 589-90 (11th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 298 (1994).

To ascertain whether the non-movant met his burden, the court resolves all doubt against the moving party. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). As the Eleventh Circuit held:

> The party seeking summary judgment bears the exacting burden of demonstrating that there is no genuine dispute as to any material fact in the case. In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non-movant. If the record presents factual issues, the court must not

> decide them; it must deny the motion and proceed to trial. Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment.

Clemons, 684 F.2d at 1368 (citations omitted); *see also Turnes*, 36 F.3d at 1060 (stating "[w]e view all evidence and reasonable factual inferences drawn therefrom in the light most favorable to the party opposed to the motion."); *Warren*, 927 F.2d at 561-62; *Warrior Tombigbee Transp. Co., Inc. v. M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983).

The inference in favor of the non-movant is not, however, unqualified.[2] An issue of material fact is "genuine" only if "a reasonable trier of fact, considering the record evidence, could find for the non-moving party." *Lee*, 963 F.2d at 1425. " 'Mere general allegations which do not reveal detailed and precise facts' will not prevent the award of summary judgment." *Resolution*

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2. The Eleventh Circuit has cautioned that a liberal construction of "material fact" cannot be used to functionally eliminate the efficacy of summary judgments. In *Brown v. Crawford County*, 960 F.2d 1002, 1007 (11th Cir. 1992), two district judges wrote in a policy and procedures statement that "decisions of the Eleventh Circuit regularly demonstrate [that] rarely can it be said without fear of contradiction that 'there is no genuine issue as to any material fact.' " The Eleventh Circuit strongly objected, stating "[w]e are particularly troubled by the misrepresentation in the local summary judgment 'procedure' stating that this court 'regularly' finds genuine issues of material fact precluding summary judgment." *Id.* at 1010 n.11.

Trust Corp. v. Dunmar Corp., 43 F.3d 587, 592 (11th Cir. 1995) (citation omitted). Moreover, evidence that is merely colorable, *see Brown v. City of Clewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988), conclusory, *see Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989), or conjecture, does not create a genuine issue of material fact.

b. The Duty of Fair Representation

Barclay's complaint and subsequent submissions allege that the Union breached its duty of representation (1) by handling his grievance in a manner that "was arbitrary, discriminatory, and in bad faith" and (2) by selecting only a single arbitrator rather than choosing a board of arbitrators as required in the grievance procedures.[3] A final decision produced from arbitration as provided in a collective bargaining agreement is reviewable if tarnished by breach of a duty by the union. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976). "To prevail against either the company or the union, [an employee] must not only show that his discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. [T]his involves more than demonstrating mere errors in judgment." *Hines*, 424 U.S. at 570-71. A union breaches that duty of fair representation whenever its actions are discriminatory, arbitrary or in bad faith. *Air Line Pilots Ass'n Inter. v. O'Neill*, 499 U.S. 65, 67 (1991) (citing *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)).

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3. Barclay also alleges that Alagasco breached the CBA by failing to have a corporate officer review his grievance in accordance with Step Three of the grievance procedure. Because intermediate procedural questions are to be left to the Board of Arbitrators, *Alabama Educ. Assn. v. Alabama Professional Staff Org.*, 655 F.2d 607, 608 (5th Cir. Unit B Sept. 1981), this issue was waived because it was not presented to the arbitrator and can not be raised for the first time on appeal.

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In conjunction with its Rule 56 motion, the Union has submitted evidence of its efforts in pursuing Barclay's grievance and has asked for a showing of proof from Barclay that the duty of representation was breached. As for the manner in which the Union actually handled prosecution of the grievance before the arbitrator, Barclay has presented no evidence, and this court finds no proof, that the Union's actions were arbitrary or that the Union discriminated in any way against Barclay. On the question of bad faith, the Union has presented a statement by the attorney retained by the Union to represent Barclay's interest which states that over 90 hours and $11,000 of legal fees were spent by the Union arbitrating Barclay's grievance. In that statement, attorney Stockham also declares that Union officials did not interfere with his efforts to win the arbitration but rather "gave [him] all of the support he needed in the effort to prevail . . . ." Barclay has not responded with any evidence that presents a genuine issue of whether the Union improperly handled the prosecution of his grievance before the arbitrator. As such, the Union is entitled to judgment in its favor on that issue.

At first this court was somewhat disturbed by the Union's failure to require the formal appointment of a three-member arbitration panel, choosing instead to proceed with a single arbitrator. The evidence clearly demonstrates that only one arbitrator, Jack Clark, actually was chosen and sat rather than the three arbitrators seemingly required by a strict or literal reading of Step Four of the grievance procedure. Responding to the order of the court, the Union has come forward with the affidavit of David Connell which declares that to his knowledge, Alagasco and the Union have never actually employed a three-member panel when Step Four has been invoked. Instead, according to Connell, representation of the Union and Alagasco (who could be deemed partial arbitrators) have chosen, at least

over the past 27 years, to mutually agree on one genuinely independent arbitrator to resolve the issues being arbitrated. Thus, the question before the court becomes whether the Union could effectively waive the three-member panel requirement without also breaching its obligation to fairly prosecute Barclay's grievance.

The Union must "be accorded a wide range of discretion in dealing with representation matters . . . ." *Papavarits v. Communication Workers of America, Local 3107*, 772 F. Supp. 604, 607 (S.D. Fla. 1991). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside of a 'wide range of reasonableness' . . . as to be irrational." *Air Line Pilots*, 499 U.S. at 67. "[M]ere negligence, even in the enforcement of a collective-bargaining agreement, [will] not state a claim for breach of the duty of fair representation." *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990).

Given that the question of the Union's possible waiver must be judged by this standard of "reasonableness" rather than one of "negligence," this court must contrast the requirements of Step Four with the actions actually taken by the Union. The relevant portion of Step Four states that "[a]rbitration shall be accomplished by a Board of Arbitrators, one member of which shall be appointed by the Company and one by the Union and a third shall be elected by the two so appointed by the Company and the Union." However, the crux of the declarations submitted by both the Union and Alagasco reflect the reality of this requirement — having a Union representative and a company representative on the panel merely creates a "rubber stamp" majority for whichever side is favored by the independent

arbitrator. Recognizing the futility in having these opposing advocates serve on the panel in order to comply with the letter of Step Four, the Union and Alagasco have instead chosen to comply with the spirit rather than the letter of the agreement by having one individual, truly independent arbitrator hear the grievance.

Having been enlightened by the parties that this procedure is in fact the pattern and practice of the Union (and its counterpart, Alagasco) in handling Step Four grievances, this court finds the custom neither arbitrary or irrational. A variation from the literal terms of a CBA does not necessarily show a breach of the Union's duty, especially absent any fundamental unfairness in the process afforded Barclay. *See Ness v. Safeway Stores, Inc.*, 598 F.2d 558, 560 (9th Cir. 1979). Because this court concludes that the inclusion of a partisan Alagasco-appointed panel member on a three-member Board would have only guaranteed the result actually reached by Clark acting individually, the court now finds that plaintiff has not met his burden in adducing proof that the Union breached its duty of fair representation. Accordingly, the Union's motion is due to be granted.

b. Breach of the Employment Contract

The above-stated result makes the resolution of Alagasco's motion almost academic. In order to establish a hybrid § 301 claim under the Labor Management Relations Act, 29 U.S.C. § 185(a), plaintiff must demonstrate both that he has been wrongfully discharged by the employer as well as that the union violated its duty of fair representation in the handling of the grievance. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976). Because this rule from *Hines* has conjunctive

requirements, plaintiff's failure to show a breach by the Union precludes this court from considering whether the dismissal violated the employment agreement. As a result, Alagasco's motion must also be granted.

III. Conclusion

Having considered the evidence and arguments submitted by the parties, this court finds that no genuine issues of fact exist on either the Union or Alagasco's liability to plaintiff. Applying the law to those facts, the motions of both defendants for summary judgment are due to be granted. A separate and appropriate order will be so entered.

Done this 27th day of October, 1995.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CIVIL ACTION NO.

95-AR-1660-E

ERVIN BARCLAY,

Plaintiff,

v.

ALABAMA GAS CORPORATION, et al.,

Defendants.

ORDER

In conformity with the accompanying memorandum opinion, the court EXPRESSLY DETERMINES that there exists no genuine issue of material fact and that defendants, Alabama Gas Company ("Alagasco") and Gas Fitters Local Union No. 548 ("the Union"), are entitled to judgment as a matter of law. Accordingly, it is

ORDERED, ADJUDGED and DECREED by the court that the motions for summary judgment of Alagasco and the Union be and the same are hereby GRANTED, and the action is DISMISSED with prejudice.

Costs are taxed against plaintiff, Ervin Barclay.

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DONE this 27th day of October, 1995.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, EASTERN DIVISION ENTERED OCTOBER 5, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CIVIL ACTION NO.

95 AR-1660-E

ERVIN BARCLAY,

Plaintiff

v.

ALABAMA GAS CORPORATION, ET AL.,

Defendants

ORDER

In the opinion of this court the only material question of fact not either agreed upon by the parties in the above-entitled cause or proven by undisputed evidence in support of the motions for summary judgment filed by defendants, Alabama Gas Corporation ("Alagasco") and Gas Fitters Local Union No. 548 ("the Union"), is whether Step Four of the grievance procedure in the collective bargaining agreement between Alagaso and the Union was complied with. In pertinent part that provision of the agreement says:

Appendix C

A.4 STEP FOUR (GRIEVANCE PRESENTED TO BOARD OF ARBITRATORS):

In the event such grievance cannot be satisfactorily adjusted in the manner and within the time specified in Step Three above, it shall then be submitted in writing to arbitration upon written notice of desire to arbitrate given by either party to the other within ten calendar days next following the day on which the corporate officer of the Company renders a written decision as provided in Step Three next above. The matter to be submitted to arbitration shall be a copy of the written grievance filed in accordance with the provisions of Step Two of this Article X and none other. Arbitration shall be accomplished by a Board of Arbitrators, one member of which shall be appointed by the Company and one by the Union and a third shall be elected by the two so appointed by the Company and the Union. . . .

* * * * *

The power of the Board of Arbitrators shall be limited solely to the determination of whether or not said grievance so submitted in writing is justified, in whole or in part, such determination to be effected by applying a proper interpretation of the provisions of

> this agreement to the facts as found by the said Board. The Board of Arbitrators shall render its decision in writing, delivering one signed copy thereof to the Company and one signed copy to the Union, and a decision of the majority of the members of said Board shall be final and binding on all parties.

Plaintiff's exhibit 2 at 30-32.

While it appears without question that Jack Clark ("Clark") acted as an independent arbitrator, the court does not find in the record any proof that Clark was selected for that position by an arbitrator appointed by Alagasco and an arbitrator appointed by the Union, and that a majority of the three thus chosen made the subject arbitral decision adverse to plaintiff, Ervin Barclay. From this court's prior experience, not only as a judge but as a lawyer and as a labor arbitrator, it knows that a "union" arbitrator and an "employer" arbitrator invariably participate in the arbitration decision only in a *pro forma* way, after having selected the third-party, or the *real*, "arbitrator," who, as a practical and actual matter, makes the decision. And yet, there is no evidence in the instant case of that fact or of such a *modus operandi* by Alagasco and the Union as their means of complying with Section Four as a mutually acceptable means of conforming to the requirements of the collective bargaining agreement; or, on the other hand, that in this instance all three arbitrators did, in fact, hear the evidence, did take the matter under submission, and together did deliberate as would a jury or a multi-membered court, and thereafter did decide plaintiff's grievance by majority vote. It may be possible by a combination of implication and general knowledge to conclude that Clark was jointly picked by individuals respectively named by Alagasco and the Union. But,

in considering these motions for summary judgment, the court is unwilling to decide by attempting an inference that might be akin to speculation.

Without precommitting to anything, if the two defendants in this case want this court to give serious consideration to their motions for summary judgment, they will by 4:30 P.M. October 13, 1995, submit affidavits or other relevant evidentiary material to meet the court's concerns as above expressed. Plaintiff may then respond as he sees fit within five (5) calendar days after defendants, pursuant to this order, submit whatever they deem appropriate. After the expiration of the said five-day period, defendants' motions for summary judgment will again be taken under submission.

Although the planning report pursuant to Rule 26 is past due, the parties are hereby relieved of that obligation until October 27, 1995.

DONE this 5th day of October, 1995.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 18, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-7006

EVIN BARCLAY,

Plaintiff-Appellant,

versus

ALABAMA GAS CORPORATION, GAS FITTERS LOCAL, UNION N. 548,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

BEFORE: ANDERSON, BLACK AND BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant Barclay is denied.

ENTERED FOR THE COURT:

s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE